In the Supreme Court of the United States

OCTOBER TERM, A. D. 1950.

No. 550.

GENEVA METAL WHEEL COMPANY,
Petitioner,

vs.

EDWARD P. O'DONNELL,
UNITED STATES CASUALTY COMPANY,
Respondents.

BRIEF OF RESPONDENTS
In Opposition to Petition for Writ of Certiorari.

OPINIONS BELOW.

The opinion of the District Court is unreported. It appears in the Record, pages 267-269. The original opinion of the Circuit Court of Appeals is reported in 183 F. 2d 733. It also appears in the Record, pages 309-317. The order denying rehearing, in effect a supplemental opinion, is not reported. It appears in the Record, pages 335-336. All briefs filed in the court below have been bound together and are filed in this Court.

JURISDICTION.

The judgment of the Circuit Court of Appeals was entered on May 25, 1950 (R. 307), and the order on rehearing was entered on November 17, 1950 (R. 335). The jurisdiction of this Court is invoked under 28 U. S. C. Section 1254 (1). This petition is filed within the statutory period under 28 U. S. C. Section 2101 (c).

QUESTIONS PRESENTED.

1. Whether the district judge was right in his view that since he disbelieved Respondents' testimony and had made his mind up that if Respondents had a verdict, he would have to set it aside because it was not supported by the greater weight of substantial and credible evidence, he had the right to withdraw the case from the jury and himself determine the credibility of the witnesses and the weight of their evidence.

The District Court answered this question, "Yes."

The Circuit Court answered this question, "No."

The Respondents contend that this question should be answered "No."

2. Whether the United States Court of Appeals for the Sixth Circuit properly applied the local law of the state of Ohio in holding that there was sufficient evidence on the trial before the District Court that the jury could reasonably consider that the evidence disclosed a probability that the accident was due to the negligent manufacture of the wheel by Petitioner, Geneva Metal Wheel Company.

COUNTER-STATEMENT OF CASE.

This cause sounding in negligence came on for hearing on the Respondents' Amended Complaint for Personal Injury and Petitioner's Answer thereto, in the District Court of the United States within and for the Northern District of Ohio.

At the conclusion of the reception of all the evidence, Petitioner's Motion for a Directed Verdict in favor of the Petitioner was sustained by the District Judge (R. 267, 268, 269). On May 28, 1949, Respondents filed a timely Motion for a New Trial, which was overruled by the District Court June 7, 1949. On the 25th day of May, 1950, the United States Court of Appeals for the Sixth Circuit set aside the judgment of the District Court and remanded the case for a new trial, and on the 17th day of November, 1950, denied Petitioner's petition for a rehearing.

On May 16, 1944, the Respondent Edward P. O'Donnell was engaged in the performance of his regular duties as an employee of the Grand Central Service Station at Chicago, Illinois. Respondent had been employed there for approximately one year, and during that time and in his regular course of employment, he had repaired three to four tires a day (R. 53), and had repaired 20 or 25 wheelbarrow tires during that time (R. 179). Respondent was an experienced man on this type of work (R. 61). On the above mentioned date, Respondent had repaired a tube which was a part of a 4.00 x 8 wheelbarrow wheel assembly. Having inserted the repaired tube in the casing, and having mounted the tube and casing on the wheel, Respondent began to inflate said tube. Respondent intended to inflate said tube with an air pressure of 48 pounds in accordance with the instructions given by Mr. Kurt Wittig, the owner of the wheel (R. 163). The tire was designed to carry a normal air pressure of 60 pounds (R. 231) and there is also a factor of safety of three times one built into the tire (R. 249), which would place the bursting of said tire at approximately 180 pounds.

After once applying the air hose to the valve, Respondent removed the air hose and applied a gauge which showed the air pressure to be 18 to 20 pounds (R. 162, 164, 181, 184). Respondent again applied the air hose and again gauged the air pressure, finding it to be 25 to 30 pounds (R. 163, 164, 181, 184). The Respondent does not remember applying the air hose again (R. 163, 181) or anything else which happened subsequently. In a matter of seconds after he had gauged the pressure a second time, the wheel disintegrated, the two sections coming apart forcibly, one section of which struck Respondent on the right hand and on and about the right portion of his face and head, seriously injuring him.

The wheel in question (Respondents' Exhibits 1 and 2) was manufactured by the Petitioner, Geneva Metal Wheel Company, and is known as their Model DC-285-P. Mr. Frank F. Branch, the chief engineer of the Geneva Metal

Wheel Company from 1938 to 1948 (R. 26), who designed their Model DC-285-P (R. 26), could not deny that Respondents' Exhibits 1 and 2 were manufactured by Petitioner (R. 28). He testified that said exhibits were "similar" to Geneva's DC-285-P (R. 27); that Exhibits 1 and 2 "could have been made by the Geneva Metal Wheel Company" (R. 28), and that he could not point out any points of dissimilarity between Exhibits 1 and 2 and Geneva's Model DC-285-P (R. 40, 41). Furthermore, after having testified that similar wheels are manufactured by the Parish Stamping Company and by the Dico Company (R. 27), Mr. Branch, when confronted with Respondents' Exhibit 8 depicting a Dico wheelbarrow wheel, himself readily found two major points of dissimilarity in that the Dico wheel contained eight rivet holes instead of six, and that the Dico wheel has no chain hole (R. 45).

Mr. Henry A. Carter, who has been employed by the Petitioner since 1916 (R. 12) and who has been president and treasurer since 1942 (R. 11), could not deny that Respondents' Exhibits 1 and 2 were manufactured by the Geneva Metal Wheel Company (R. 18, 25).

Two expert engineers, Norman J. Beno of Chicago and Bernard R. Krashin of Cleveland, testified in behalf of Respondents as to the cause of disintegration of the wheel in question. Norman J. Beno, the first of Respondents' engineers to take the stand, possesses both a Bachelor of Science degree in engineering and a Master of Science degree in physical chemistry from Marquette University, and has had a vast amount of experience in the field of metallurgy and the physics of air pressure, having spent 18 years in the testing laboratory of the Continental Can Company (R. 71, 72). Bernard R. Krashin, who also testified in behalf of the Respondents, possesses a Bachelor of Science degree in chemistry from Western Reserve University, and has for the past 8 years been assistant technical director of the Cosma Laboratories, whose chief work is that of testing metals for both private manufacturers and

the armed services. Cosma Laboratories has been sanctioned by the Army, Navy and Air Force as an approved testing laboratory for all metal substances used in the construction of materials of war (R. 46).

Both of Respondents' expert engineers unqualifiedly testified that *it was* possible to reconstruct and determine the condition of the ferrules and the wheel in question at the time of manufacture. Not only did they state that it was possible, they went further and stated that they had *in fact* determined the condition of the said ferrules and wheel in question at the time of manufacture (R. 89, 144, 145). It should be kept in mind that both engineers testified that they had made the necessary examinations and tests of the ferrules and wheel and arrived at their conclusions independently of each other (R. 141). Both of Respondents' engineers testified that the disintegration of the wheel in question, which caused the injury complained of, was due to defects in the ferrules existing at the time of manufacture (R. 75, 87, 156), and not to the application of excessive air pressure to the pneumatic tire and tube mounted on the wheel.

Said defects were in the ferrules which held the two halves of the wheel together. Five of the six ferrules had radial cracks in the rolled over edge of the ferrule (R. 139), which cracks would have the effect of materially weakening the ferrules (R. 77, 142, 149). The rolled over edge of the ferrules also had a thinned out section where they had been rolled to a point, which further weakened the ferrules (R. 142).

There was no unjustified assumption that the strongest or thickest ferrule was standard and that the other five were below standard and therefore defective. The evidence shows that at least three of the ferrule rivets were outside the minimum safe tolerance as set up by Mr. Branch, who designed the wheel. The variance from the minimum safe tolerance ranged from .002 of an inch to .006 of an inch, under the minimum safe standards set up by Mr. Branch.

Both of these conditions occurred at the time of manufacture (R. 144, 145). The radial cracks could have been seen at the time of manufacture (R. 153), and could have existed only before disintegration (R. 153) because at the time of disintegration, the rolled over edge was drawn through the rivet hole in the disk, which action would tend to close the radial cracks (R. 83, 92) rather than open them. These ferrules also contained circular cracks which would tend to further weaken the strength of these ferrules (R. 77, 147, 148, 149).

The expert testimony also revealed that in the light of the above defects in the ferrule rivets, which undoubtedly occurred at the time of manufacture, the wheel could have failed at an air pressure of only 40 pounds (R. 87).

There was no evidence that the wheel or ferrules, while in use, had been abused or mistreated in any way (R. 90, 144, 146).

To meet the evidence given by Respondents' expert engineers, Petitioner called on Frank F. Branch who designed the wheel for Petitioner. Mr. Branch has no degree of any kind, his formal training consisting of high school, one year of mechanical engineering at the University of Chicago, a night course in drafting and strength of materials at Case Institute of Technology, and a course from the International Correspondence School. Since that time, he has occupied the position of master mechanic in Petitioner's employ and subsequently rose to the position of chief engineer (R. 38). Throughout the whole of his testimony, Mr. Branch was unable to show that *this* wheel had been subjected to tests for defects before it was placed on the market. In fact, the major portion of his testimony was concerned with statements of a *general* nature purporting to show the *general* process of manufacture and that the care taken at all times in such manufacturing process was the best that was in general use in the manufacture of wheels. He stated that 35 pounds of air pressure was put

in each tire mounted on a wheel before it was shipped (R. 37), despite the fact that the wheel was designed by him to withstand a maximum air pressure of 120 pounds (R. 27). Some wheels which were shipped by Petitioner were shipped without tires, and those were not given a pressure test at all (R. 34). Approximately one wheel out of each one thousand manufactured (or one-tenth of 1%) was given a hydrostatic pressure test to a pressure of at least 125 pounds (R. 37, 38).

In rebuttal of Respondents' evidence that the radial cracks in the ferrule rivets were caused in the manufacturing process before the wheel left Petitioner's factory, Mr. Branch testified that radial cracks could be caused by the application of excessive air pressure in the tire (R. 246), but he also stated that he had never seen any cracks develop even at an air pressure at 125 pounds (R. 246). There is abundant evidence in the record to show that on the occasion of this accident, the wheel involved was inflated with a pressure of not more than 30 pounds (R. 163, 164, 181, 184).

It should be noted that all three of the above mentioned engineers, including Mr. Branch, stated that if the ferrules were defective, the wheel would be "inherently dangerous" (R. 99, 146, 245).

The Circuit Court of Appeals in opinion found that the questions discussed by the District Court in directing the verdict were all questions of fact properly to be determined by the jury, since they involved the weight and credibility of the testimony (R. 314, 315). The Circuit Court also found that the "inherent instrumentality doctrine" of *MacPherson vs. Buick Motor Company,* 217 N. Y. 382, 111 N. W. 1050, was applicable (R. 315). Said court also found that the law of negligence as applied by the highest court of the state of Ohio was controlling in this case (R. 335).

ARGUMENT.

Petitioner, in its brief, propounds four reasons why its petition herein should be granted. The first of these being that the Circuit Court ignored this Honorable Court's holding in *Pennsylvania R. R. vs. Chamberlain,* 288 U. S. 233, and the holding in *Gedra vs. Dallmer,* 153 O. S. 258, which latter case Petitioner contends is in accordance with the former in holding that where proven facts give equal support to each of two inconsistent inferences, judgment as a matter of law must go against the party having the burden of proof.

Respondent has no quarrel with these decisions and agrees with Petitioner that they clearly state the law in their respective situations and should govern a trial court in an applicable situation. However, in the instant case, the facts and evidence give no reasonable grounds for the application of this rule of law, because this Respondent contends that the facts do not give equal support to each of two inconsistent inferences. Nor did the Circuit Court think so when it said in opinion:

> "The jury could reasonably consider that the evidence disclosed a probability rather than a mere possibility that the accident was due to the negligent manufacture of the wheel by appellee company." (R. 335, 336.)

Thus the Circuit Court did not fail to follow the rule of law announced in the *Chamberlain* and *Gedra* cases; they in effect held that said rule of law was not applicable in view of the proven facts.

Petitioner's contention that the Circuit Court ignored the accepted common law followed in Ohio and instead treated the instant case as though it were a "Federal Employers Liability Act" case is completely unwarranted. In its Order Denying Petition for Rehearing, the Circuit Court said:

> "In this case, the law of Ohio controls. In the latest adjudication of the Ohio Supreme Court on the subject that has come to our attention, it is held that it is

> not sufficient for a plaintiff to prove that the negligence of a defendant might have caused an accident; if the cause of the injury to a plaintiff may be as reasonably attributed to an act for which the defendant is not liable as to one for which he is liable, the plaintiff has not sustained the burden of showing that his injury is a proximate result of the negligence of the defendant. *Gedra v. Dallmer,* 153 Ohio St. 258. This rule, however, in no way alters the conclusions heretofore expressed in the opinion of this court on the appeal in this case." (R. 335.)

Thus the Court obviously founded its decision on the local law of Ohio.

Petitioner also contends that "the Circuit Court acknowledges that two inferences could be drawn from the facts in the instant case." A more correct analysis would seem to be that the Circuit Court found that there were *not* two inconsistent inferences but rather that Respondents herein had offered sufficient evidence that the jury could reasonably consider that the evidence revealed a probability that the accident was caused by the negligent manufacture of the wheel by Petitioner.

Petitioner also contends that the decision of the Circuit Court in the instant case is at variance with said court's prior decisions in the cases of *Parker vs. Gulf Refining Company,* 80 F. 2d 795, and *O'Mara vs. Pennsylvania R. R. Co.,* 95 F. 2d 762. The *Parker* case involved a situation wherein there existed four possibilities as to the proximate cause of the injury sustained. Of these four, defendant could clearly not be charged with negligence for two of them. The *O'Mara* case involved a situation wherein there was *no* proof of negligence attributable either to the defendant railroad or to any fellow servant of the plaintiff. Obviously the Circuit Court was correct in holding that such cases should not be submitted to the jury for them to "speculate" upon. As can be seen, neither case is comparable with the one at bar.

The Respondent, therefore, contends that it is readily apparent from the foregoing that there is no conflict either in principle or decision between the judgment rendered in this case and the local law of Ohio, or previous decisions of this Honorable Court or the Circuit Court. The Circuit Court neither overruled any of its former decisions nor decided this case contrary to the decisions of this Honorable Court or the Supreme Court of Ohio. This case of necessity falls within that class of cases which turns upon its own facts and will affect no one other than the litigants hereto.

Judge Florence Allen, a judge of long experience in the jurisprudence of the state of Ohio, having sat on the bench of the Supreme Court of Ohio for many years, participated in the judgment. Judges John D. Martin, Sr. and Thomas F. McAllister, who also participated in the judgment, have, for a period of many years, been members of the United States Court of Appeals for the Sixth Circuit, which includes Ohio. All three judges concurred in the opinion.

CONCLUSION.

It is therefore respectfully urged that Petitioner's Petition for Writ of Certiorari be denied.

Respectfully submitted,

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REPLY BRIEF OF PETITIONER.

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Citations.

Gedra v. Dallmer, 153 O. S. 258 (1950) 1, 3

Pennsylvania R. R. Co. v. Chamberlain, 288 U. S. 333 (1933) 1, 3